

Original

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

JAN 21 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	FCC 02-201
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations	)	RM-9027
(Anniston and Ashland, AL, College Park,	)	RM-9268
Covington, and Milledgeville, Georgia)	)	RM-9384

To: The Commission

REPLY TO RESPONSE TO  
NOTICE OF NO RESPONSE RECEIVED TO THIRD AND  
FOURTH MOTIONS FOR LEAVE TO FILE SUPPLEMENT  
AND  
REQUEST FOR ENTRY OF ADVERSE FINDINGS AGAINST WNNX LICO, INC.

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OK 9

January 21, 2003

Preston W. Small (Mr. Small), by his attorney, hereby replies to WNNX LICO, Inc.'s January 14, 2003 *Response to Notice of No Response (Response)*. In reply thereto, the following is respectfully submitted:

1) WNNX begins its response to Mr. Small's *Third and Fourth Motions for Leave to Supplement the Record* by claiming that Mr. Small has no basis for filing supplemental information with the Commission and requesting leave to do so. *Response*, at 1. Mr. Small's *Third and Fourth Motions* were filed to provide the Commission with information, including a factual finding by a Federal judge, that WNNX/Susquehanna Radio Corp. has made civil threats against Mr. Small. The information presented in the motions stands diametrically opposed to WNNX's categorical denial of ever having threatened Mr. Small with civil liability as represented to the Commission in WNNX's November 8, 2002 *Consolidated Opposition*. WNNX continues this bare denial in its *Response*, at 2-3, in the face of overwhelming evidence to the contrary, and without offering any evidence that the threats were not made.

2) WNNX claims that the evidence of its 1997 threat against Mr. Small is not admissible at this point in the proceeding because Mr. Small should have raised the point earlier. *Response*, at 3. However, the Federal judge made the factual finding that Susquehanna/WNNX made the civil threat against Mr. Small in his November 26, 2002 ruling denying BCI's motion for preliminary injunction against Mr. Small. The judge's order was entered after Mr. Small filed his November 21, 2002 *Reply to Consolidated Opposition* and the information is properly presented in a supplemental filing.

3) WNNX asks: "Why did Small wait until now to bring it to the Commission's attention?" The reason is obvious: the Judge's November 26, 2002 factual finding demonstrating that WNNX/

Susquehanna's November 8, 2002 "categorical" denial made to the Commission is completely false. WNNX tries to do a slight of hand by claiming that "it is far too late for Small to supplement the record now with a statement made in a 1997 pleading." *Response*, at 3. Of course, Mr. Small is using the contents of the Judge's recent order, not a pleading filed in 1997, as the factual information of significance. WNNX has clearly lied to the Commission in its November 8, 2002 *Consolidated Opposition*. Rather than, for example, expressing regret for an inarticulately worded sentence, WNNX continues the denial in the face of irrefutable documentary evidence claims that the Commission cannot do anything about it at this point because "it is far too late." *Response*, at 3. WNNX's cavalier attitude concerning the very serious issue of misrepresentation demonstrates WNNX's appalling lack of regard for the truth and candor the Commission demands from the parties appearing before it.

4) Even if WNNX were correct that the information contained in the Judge's November 2002 order and submitted in the *Fourth Motion* were untimely vis-a-vis the ongoing proceeding before the Commission, WNNX's reliance upon technical pleading rules, while continuing the misrepresentation in the very pleading which asserts the technical pleading rule, must be found unavailing. That is, even if the matter discussed in the judge's November 2002 order were untimely raised in this proceeding, that does not mean that WNNX did not make a prior threat and it does not mean that WNNX may, in good faith, continue to deny making the threat. It made the threat and WNNX's continuation of its denial in the *Response* constitutes another misrepresentation. WNNX has been caught with its finger in the cake and, rather than express regret, WNNX hopes that it can continue the deceit by claiming that it is too late to bring the prior threat to the Commission's attention to contradict WNNX's recent, and continuing, claim that it never threatened Mr. Small.

WNNX's reliance upon technical pleading rules to try to cover its continuing misrepresentation is absurd on its face and requires sanctions.

5) WNNX further claims that the threat of civil litigation made in the 1997 pleading "was not a threat." *Response*, at 3. The Federal judge found, however, that WNNX's 1997 pleading claims that WNNX made a threat that Mr. Small's activities before the FCC "triggered civil action," *Fourth Motion for Leave*, Attachment, Judge's Order, at 16. Of course the 1997 pleading constitutes a threat of civil action against Mr. Small and the judge is clearly being critical of BCI/Susquchanna/WNNX for having made the threat, but for then failing to follow through for more than five years. This is not "wild speculation" by Mr. Small which Mr. Small hopes people will accept as true by repetition as WNNX claims, *Response*, at 2. What is at issue is a Federal court order and the finding of a federal court judge. WNNX's apparently disregard for the Federal court's order does not even remotely suggest that the Commission should hold the order with the disdain WNNX exhibits. The order says what it says and WNNX's disregard for the judge's conclusion is irrelevant and disrespectful to the judge and the court.

6) WNNX further argues that even if the statement were a threat that

The statement was not a threat by WNNX because the statement related to an agreement between Small and Sapphire Broadcasting, Inc. (Bridge Capital Investor's predecessor). That agreement did not transfer to WNNX with the station license. In his pleading, Small assumes that WNNX would now be the successor party to the agreement and has rights under that agreement. WNNX does not have any rights under that agreement and never did. Thus, the alleged threatening statement cited in the 1997 pleading was attributed to Sapphire and not to WNNX.

*Response*, at 4 n. 6

7) WNNX's statement of denial quoted immediately above clearly constitutes further misrepresentation. Attached hereto is a copy of WNNX's May 27, 1997 *Reply to Opposition to*

*Petition for Reconsideration*. That pleading is not a joint filing between WNNX and Sapphire, it is a pleading which WNNX filed alone.’ WNNX clearly claims in the very first line of that *Reply* that WNNX is the “successor-in-interest to Sapphire Broadcasting, Inc.” *Reply to Opposition to Petition for Reconsideration*, at 1. On the same page WNNX writes that “Sapphire had been the successor to Emerald under that same Agreement,” *Reply to Opposition to Petition for Reconsideration*, at 1. indicating that WNNX had assume the role of “successor-in-interest.” WNNX later states its understanding that the Commission does not interpret private agreements “until there is a local court ruling” and that WNNX thought it was “premature to file suit” in light of some ongoing settlement discussions. *Reply to Opposition to Petition for Reconsideration*, ¶ 5. The local court has now ruled that WNNX/Susquehanna issued a threat of civil litigation against Mr. Small in 1997. The position WNNX now takes before the Commission in its *Response to Notice to No Response* not only contradicts the Federal court’s factual finding, it obviously contradicts the plain contents of WNNX’s *Reply to Opposition to Petition for Reconsideration* and constitutes a serious, further misrepresentation.’

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<sup>1</sup> WNNX’s claim that certain statements in 1997 pleadings are “attributed to Sapphire,” but not to WNNX/Susquehanna, is absurd. WNNX was the sole filer of May 27, 1997 *Reply to Opposition to Petition for Reconsideration* and WNNX was a co-filer of the April 30, 1997 *Petition to Deny* filed against File No. BALH-961223GI. There is no indication in either of those pleadings that any proffered statement were not to be attributed to WNNX/Susquehanna.

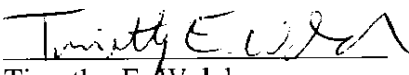
<sup>2</sup> WNNX’s threat of civil litigation is clear. Mr. Small proceeded in light of the threat and is currently defending against the, at one time, threatened civil action. WNNX’s assertion that Mr. Small did not consider the statement to be a threat because he continued to litigate, *Response*, ¶ 4, is obtuse. Whether Mr. Small heeded the threat does not determine whether a threat was issued. Mr. Small determined that the threat was groundless which was issued with the intent to obstruct him. Mr. Small’s determination to move forward in the face of the threat of civil litigation does not mean that the threat was not issued. It is WNNX’s actions which are in question, not Mr. Small’s response to go forward in the face of threats of civil liability.

8) Finally, WNNX resorts to Black's Law Dictionary to argue that the civil threats it made against Mr. Small do not meet the legal definition of "threat" because WNNX did not intend for the statements "to inflict harm or loss" upon Mr. Small and that WNNX was merely stating its "opinion." *Response*, at 3 & n. 3.' The civil litigation instituted against Mr. Small in August 2002, including the preliminary injunction proceeding, is intended to force Mr. Small's unwilling withdrawal from the instant proceeding. That certainly constitutes a "harm" in our book. Moreover, Black's Law Dictionary, Fifth Edition, 1981, defines "harm" as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." Accordingly, WNNX's statements constitute a threatened "harm or loss" even in WNNX's book.

WHEREFORE, in view of the information presented herein and in earlier pleadings, it is respectfully requested that the Commission enter adverse findings against WNNX on the misrepresentation and abuse of process issues, disqualify WNNX from the instant proceeding, dismiss WNNX's petition for rulemaking, and grant Mr. Small's petition for rulemaking.

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January 21, 2003

Respectfully submitted,  
PRESTON W. SMALL

  
Timothy E. Welch  
His Attorney

---

<sup>3</sup> WNNX's attempt to turn its "threats" into "opinions" suffers from the fact that its "opinions" are irrelevant to this proceeding. The Commission is interested in facts and law and it is not interested in WNNX's opinions about civil liability matters which are clearly beyond the Commission's jurisdiction. WNNX made the libel threats for Mr. Small's consideration, not the Commission's and WNNX's explanation that its threats of libel liability were intended to have no effect is nothing but a weak attempt to cover up in the corner.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Application of	)	
	)	
Preston W. Small	)	BALH-961223GI
Assignor	)	
	)	
and	)	
	)	
Scotts Trail Radio, Inc	)	
Assignee	)	
	)	
For Assignment of License of Station	)	
WLRR(FM), Milledgeville, Georgia	)	
To: Chief, Audio Services Division		
Mass Media Bureau		

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

WNNX License Investment Co. ("WNNX"). successor-in-interest to Sapphire Broadcasting, Inc. ("Sapphire")', by its counsel, hereby replies to the "Opposition to Petition for Reconsideration" filed by Preston W. Small ("Small") on May 7, 1997<sup>2</sup>. In support hereof, WNNX states as follows:

1. WNNX is the beneficiary successor under the February 12, 1990 Agreement between Emerald Broadcasting of the South, Inc. ("Emerald") and Small which was referenced in the Petition for Reconsideration. Sapphire had been the successor to Emerald under that same Agreement. The Agreement provided that neither Small nor his successors would file a rule making proposal which would conflict with the

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<sup>1</sup> On May 22, 1997, WNNX consummated the transaction to purchase Station WHMA(FM), Anniston, Alabama from Sapphire.

<sup>2</sup> This reply is timely filed pursuant to Section 1.106(h) and 1.4 of the Commission's Rules.

proposed move of WHMA's proposed new community of license in northwestern Georgia for as long as that proposal remains pending. Small was paid an agreed upon amount for his willingness to cooperate. The Agreement binds Small's successors. However, Scotts Trail Radio, Inc., ("Scotts"), Small's successor in this Agreement, has indeed filed a conflicting rule making proposal, apparently unaware of the Emerald/Small Agreement. The Agreement was not disclosed to the Commission in the context of the instant assignment of license and there is reason to doubt whether Scotts would have filed the rule making proposal to seek an assignment of Small's license for WLRR, Milledgeville, Georgia, had it known that it could not move the station as it is now proposing to do. These matters were set forth in Sapphire's Petition for Reconsideration and are reiterated here.

2. Small's opposition pleading fails to address the substantive matters raised in the Petition for Reconsideration and brought to the Commission's attention for the first time by Sapphire. Instead, in an apparent attempt to avoid dealing with a serious breach of contract, Small has decided to focus the Commission's attention on certain procedural matters calling the filing frivolous and alleging abuse and delaying tactics. Sapphire's attorney has prepared a Declaration which responds to certain allegations raised by Small. See Exhibit 1.

3. Clearly, Small would like to keep Emerald's payment while also obtaining the purchase price from Scotts and, somehow, collect an additional payment from Sapphire or WNNX based on a provision in the agreement calling for such payment upon assignment of the station to a successor. See Exhibit 2, Demand Letter from Small. Yet Small, for his part, apparently believes that he has no obligation to abide by this



...  
agreement in forbearing. and informing his successor to forbear, from submitting a rule making proposal inconsistent with the pending move to Sandy Springs, Georgia in MM Docket 89-585.


4. The Commission attempted to address the Small/Emerald Agreement, by letter of March 26, 1997, but the opponent Dale Van Cantfort did not have a copy of the agreement and could not cite any provisions to the Commission. The Commission did not, as Small alleges, rule that the agreement was a private contractual matter more appropriate for resolution by a local court. That statement by the Commission refers instead to Mr. Van Cantfort's claim that he had a contract to purchase the station. Thus, upon obtaining a copy of the Emerald/Small Agreement, Sapphire and WNNX have a basis for seeking Commission reconsideration contrary to Small's belief that the filing of the petition for reconsideration was frivolous. In fact, the filing would have been frivolous if Sapphire/WNNX had not seen the Agreement and filed the reconsideration anyway. Now that the Agreement has been obtained by Sapphire and WNNX, there is certainly a basis for questioning this transaction and an obligation to call the Commission's attention to a provision which may cause the parties to reconsider closing the deal.

5. WNNX recognizes that the Commission would rather avoid considering private agreements until there is a local court ruling. However, having only recently obtained a copy from the original party to the Agreement and after first commencing some discussion toward a resolution without litigation, it is still premature to file suit. Therefore, at the very least, WNNX asks the Commission to condition its approval on the outcome of litigation between the parties if indeed the Commission decides to approve

this transaction on reconsideration See e.g., Decatur Telecasting, Inc., 7 FCC Rcd 8622 (1992).

Respectfully submitted,

WNNX LICENSE INVESTMENT CO.

By:   
Mark N. Lipp  
Ginsberg, Feldman and Bress, Chartered  
1250 Connecticut Avenue, NW  
Washington, DC 20036

Its Counsel

May 27, 1997

**EXHIBIT 1**

## DECLARATION

I, Allan G. Moskowitz, hereby declare, under penalty of perjury, that the following is true and correct:

1. I am an attorney employed by Kaye, Scholer, Fierman, Hays & Handler, LLP, which represents Sapphire Broadcasting, Inc. ("Sapphire"), previous licensee of Radio Station WHMA-FM, Anniston, Alabama, before the Federal Communications Commission.

2. I have reviewed the "Opposition to Petition for Reconsideration" filed by Preston W. Small in this proceeding on May 7, 1997.

3. On April 28, 1997, the principal of Sapphire requested that a telephone call be made to Timothy E. Welch, Esq., counsel for Preston W. Small. I called Mr. Welch midday of April 29, 1997 and left a message on his firm's answering machine.

4. I again called Mr. Welch at approximately 4:30 p.m. on April 29, 1997. At that time, I was totally unaware that a demand letter had been sent from Mr. Small to Sapphire.

5. Mr. Welch answered the second telephone call. The entire conversation consisted of five, possibly six, sentences between Mr. Welch and myself. In response to a question, Mr. Welch barked something about a demand letter which I did not quite catch. Assuming that Mr. Welch was referring to the Agreement between Mr. Small and Sapphire, I noted that the Agreement could be interpreted to have expired. Each of Mr. Welch's responses to each of my few statements *or* questions were, to me, inexplicably belligerent. In light of Mr. Welch's (dis)temperament, I quickly ended the conversation. We never discussed the actual purpose of my telephone call because we never got that far.

6. At 4:55 p.m. on April **29**, 1997, I received a telephone call from Mollie Engle with a message that "Tim Welch called her and asked her to call you." At approximately 5:00 p.m. or 5:15 p.m., I called Ms. Engle, who I did not realize at that time had apparently sent the demand letter to Sapphire on behalf of Mr. Small. At the time I talked to Ms. Engle, I did not know that a demand letter had been sent to Sapphire from Mr. Small.

7. On Page 7 of Preston W. Small's "Opposition", it is alleged, apparently by **Mr.** Welch, that "**Mr.** Moskowitz apparently played a **role** in convincing untimely objectors to file the frivolous petition." The allegation infringes upon attorney-client privilege and, in any event, is completely erroneous (and hilarious).

8. Despite the "Opposition's" assumption at Footnote 10 that I prepared the "Petition for Reconaideration", it should be noted that the names of three attorneys, one representing ~~WNNX~~ License Investment Company, appear on the signature page and that **just** because I signed off on the pleading for them (for convenience) does not mean that they **were** uninvolved in the preparation of the pleading.

  
Allan G. Moskowitz

Dated: May **27**, 1997

## EXHIBIT **2**

MOLLIE FLEEMAN ENGLE  
ATTORNEY AT LAW

785 SOUTH MAIN STREET  
MADISON, GEORGIA 30650  
(706)343-0258

April 28, 1997

Hoyt J. Goodrich  
President  
Sapphire Broadcasting Inc.  
Glenpointe Center East  
Teaneck, New Jersey 07666  
(By Federal Express)

Dear Mr. Goodrich:

Mr. Preston Small has retained me to represent him regarding the February 12, 1990 contract between Sapphire's predecessor, Emerald Broadcasting of the South, Inc., and himself.

Please have this letter serve as notice that Mr. Small hereby demands the substantial payment stated in Paragraph 6.2 of that February 12, 1990 contract.

Mr. Small has instructed me to inform you that if payment by certified check is not received by him at the address listed below within five days from your receipt of this letter, legal action will be taken against Sapphire and its buyer in order to protect Mr. Small's interests.

The address to which to send the certified check is:

Preston P. Small  
1281 Estenton Road  
Madison, Georgia 30650

Your immediate attention to this matter will be appreciated.

Sincerely,

*Mollie Fleeman Engle*  
Mollie Fleeman Engle

cc: Matthew E. Gornaly III  
Secretary & Director  
Sapphire Broadcasting, Inc.  
(By Certified Mail)

Thomas P. Gannon  
Sapphire Broadcasting, Inc.  
(By Certified Mail)

David E. Kennedy ✓  
President  
Susquehanna Radio Corporation  
(By Federal Express)

Kevin C. Boyle, Esq.  
Latham & Watkins  
(By Certified Mail)



CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Ginsburg, Feldman and Bress, Chartered, hereby certify that I have, on this 27th day of May, 1997, sent by first-class U.S. Mail, postage prepaid, copies of the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" to the following:

Timothy E. Welch, Esq.  
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Kaye Scholer Fierman Hays and Handler  
901 15th Street, NW  
Suite 1100  
Washington, DC 20005  
(Counsel to Sapphire Broadcasting, Inc.)

  
Lisa M. Balzer

CERTIFICATE OF SERVICE

I hereby certify that I have this 21<sup>st</sup> day of January 2003 served a copy of the foregoing  
REPLY TO RESPONSE TO NOTICE OF NO RESPONSE RECEIVED TO THIRD AND  
FOURTH MOTIONS FOR LEAVE TO FILE SUPPLEMENT AND REQUEST FOR ENTRY OF  
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